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RIEFS

No. 16-784

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In The

Supreme Court of the United States

MERIT MANAGEMENT GROUP, LP,

Petitioner,

v.

FTI CONSULTING, INC., as Trustee of the Centaur, LLC Litigation Trust,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 3

I. A Trustee Cannot Disregard a Transfer By or To a Financial Institution That Was an Integral Part of an Overall Transaction Merely Because the Trustee Insists That He Seeks Only To Unwind the Broader Transaction 3

A. The purchase and sale of stock in this case was an integrated transaction involving multiple transfers 4

B. Respondent's arguments for disregarding the component transfers are unpersuasive 6

II. Respondent's Conception of the Purpose of Section 546(e) Is Inconsistent with the Statute's Actual Terms and Purposes 10

A. Respondent's argument does not explain why Congress protected transfers "by" financial institutions, stockbrokers, and other specified entities that become debtors, and not merely transfers "to" them 11

B. Respondent's argument does not account for the safe harbor's protection of transfers of debtors' property "by" non-debtor financial institutions, stockbrokers, and others 13

TABLE OF CONTENTS – Continued

Page

C. Respondent's argument does not make sense of Congress's decision to protect subsequent transferees and other Section 550 defendants 14

D. The statute's protection of these transfers indicates that Congress had broader goals, including protecting parties' interests in the finality of transactions in securities and commodities 15

III. Respondent Misreads the Statutory Context and History 18

A. Petitioner's interpretation of Section 546(e) is consistent with the statutory context 18

B. Respondent's analysis of *Seligson* and former Section 764(c) is erroneous 19

C. Respondent's use of legislative history is unpersuasive 20

IV. A Broad Interpretation of Section 546(e) Does Not Portend the Demise of Fraudulent-Transfer Law 23

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

A.D.M. Corp. v. Thomson, 707 F.2d 25 (1st Cir. 1983) 13

In re Besing, 981 F.2d 1488 (5th Cir. 1993) 8

BFP v. Resolution Trust Corp., 511 U.S. 531 (1994) 8, 24

Contemporary Industries Corp. v. Frost, 564 F.3d 981 (8th Cir. 2009) 10

In re Criswell, 102 F.3d 1411 (5th Cir. 1997) 8

Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973 (2017) 22

In re Freedom Group, Inc., 50 F.3d 408 (7th Cir. 1995) 8

In re Global Crossing, Ltd., 385 B.R. 52 (Bankr. S.D.N.Y. 2008) 24

Graham County Soil & Water Conservation District v. United States ex rel. Wilson, 559 U.S. 280 (2010) 22

In re Hulm, 738 F.2d 323 (8th Cir. 1984) 8

Levit v. Ingersoll Rand Financial Corp., 874 F.2d 1186 (7th Cir. 1989) 16

In re Loranger Manufacturing Corp., 324 B.R. 575 (Bankr. W.D. Pa. 2005) 25

In re Marshall, 550 F.3d 1251 (6th Cir. 2008) 8

In re Munford, Inc., 98 F.3d 604 (11th Cir. 1996) 10, 22

TABLE OF AUTHORITIES – Continued

Page

Patterson v. Shumate, 504 U.S. 753 (1992) 17

In re Quebecor World (USA), Inc., 719 F.3d 94 (2d Cir. 2013) 25

In re Resorts International, Inc., 181 F.3d 505 (3d Cir. 1999) 23

Rubin v. Manufacturers Hanover Trust Co., 661 F.2d 979 (2d Cir. 1981) 23

Seligson v. New York Produce Exchange, 394 F. Supp. 125 (S.D.N.Y. 1975) 19, 20

In re Smith, 811 F.3d 228 (7th Cir. 2016) 8

In re TOUSA, Inc., 680 F.3d 1298 (11th Cir. 2012) 23

In re Tribune Co. Fraudulent Conveyance Litigation, 818 F.3d 98 (2d Cir. 2016), *petition for cert. filed* (Sept. 9, 2016) (No. 16-317) 17

In re TVGA Engineering, Surveying, P.C., 562 B.R. 862 (Bankr. W.D.N.Y. 2016) 25

STATUTES

11 U.S.C. § 101 4

11 U.S.C. § 101(22)(A) 14, 19

11 U.S.C. § 101(25) 22

11 U.S.C. § 101(53A)(B) 19

11 U.S.C. § 107(d) (1976) (repealed 1978) 7

11 U.S.C. § 544 7

TABLE OF AUTHORITIES – Continued

Page

11 U.S.C. § 544(a) 7
11 U.S.C. § 544(b)(1) 7
11 U.S.C. § 545 7
11 U.S.C. § 546 16
11 U.S.C. § 546(e) ..... *passim*
11 U.S.C. § 547 7
11 U.S.C. § 547(b) 7
11 U.S.C. § 548(a)(1) 7
11 U.S.C. § 548(a)(1)(A) 7
11 U.S.C. § 548(a)(1)(B)(ii)(I)-(III) 7
11 U.S.C. § 548(a)(1)(B)(ii)(IV) 7
11 U.S.C. § 548(a)(2) 18
11 U.S.C. § 548(e)(1)(B) 7
11 U.S.C. § 550 ..... 8, 9, 15
11 U.S.C. § 550(a) 8, 14
11 U.S.C. § 550(c) 16
11 U.S.C. § 555 ..... 18, 19
11 U.S.C. § 741(7) 22
11 U.S.C. § 761(4) 22
11 U.S.C. § 764(c) (repealed 1982) 19, 20
12 U.S.C. § 2605(g) 5
Bankruptcy Act of 1898 7

TABLE OF AUTHORITIES – Continued

Page

REGULATIONS

12 C.F.R. § 220.4(d) 13

OTHER AUTHORITIES

Black's Law Dictionary (10th ed. 2014) 5

Douglas G. Baird & Thomas H. Jackson, *Fraudulent Conveyance Law and Its Proper Domain*, 38 Vand. L. Rev. 829 (1985) 16, 17

H.R. Rep. 103-835 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340 16

H.R. Rep. No. 109-31(I) (2005), *reprinted in* 2005 U.S.C.C.A.N. 88 21

INTRODUCTION

FTI insists that nothing about the Valley View-Merit transaction is relevant other than what it describes as the overall transfer made "by" Valley View and "to" Merit. Yet there is no dispute that there was no direct transfer between these parties. Rather, at Valley View's request, its lender, Credit Suisse, transferred $55 million to Citizens Bank, and Citizens transferred that money over a period of several years to Merit and the other former shareholders of Bedford Downs for their stock. Simply put, the transaction required several transfers, both "by" and "to" financial institutions, along the way.

Under the text of the statute, these undisputed facts matter. Section 546(e) provides that a trustee may not avoid a transfer "by," "to," or "for the benefit of" a financial institution or another type of entity specified in the statute. And those entities include securities clearing agencies and other firms that almost always function as intermediaries, not as the beneficial holders of securities. Nothing in this language suggests that the trustee can simply ignore the actual mechanics of a transaction. Rather, as most circuits to consider the issue have held, the words Congress chose demonstrate that it intended to protect a securities transaction in which a financial institution, securities clearing agency, or other specified entity served as an intermediary.

FTI's justification for its contrary approach requires it to elide important distinctions on both the *by*

and the *to* ends of the transfer. One of Congress's purposes in enacting and repeatedly expanding Section 546(e) was no doubt to protect from liability the six types of firms identified in the statute. But FTI's premise that this was Congress's *only* objective cannot be right. By its terms, the statute bars a trustee from avoiding not only a transfer made "to" any of the specified entities, but also a transfer "by" such an entity to a recipient that is *not* an entity specified in the statute. FTI's narrow reading of Congress's intent – as seeking only to preclude recovery *from* the listed institutions – does not account for the decision to insulate an individual investor or another recipient that is not named in the statute from liability in such a situation.

To be sure, Congress did not leave reports or floor debates that explain precisely what it hoped to accomplish when it expanded the statute over the last few decades. But the development of the text shows that Congress has progressively restricted a trustee's power to disturb settled securities and commodities transactions, thereby enhancing the interests of the parties in finality and the national interest in encouraging investment by reducing long-tailed risks to investors.

FTI also claims that if Merit prevails, a financial institution's payment of a check or receipt of a wire transfer would be sufficient to insulate any transaction from avoidance. Many of FTI's arguments, including superfluity and exception-swallowing-the-rule (Resp. Br. 27-29), turn on that supposition. But those are not

the facts of this case, nor of any of the others comprising the circuit split. And in the 33 years since financial institutions were added to Section 546(e), only a handful of bankruptcy and district courts have drawn the conclusion that FTI says is inevitable if this Court reverses: that the passive processing of a payment by a bank will be sufficient to trigger the safe harbor.

The banks in this case were active participants in a securities transaction, providing financing, arranging the proper exchange of the cash and securities involved, and holding a portion of the funds for years. A reversal in this case will not open Pandora's box. Nor will it gut fraudulent-transfer law, which will continue to apply to actual fraud in securities and commodities transactions and in all respects in other fields. Rather, a reversal here will simply mean that this Court has given effect to the words of the statute and has left to Congress the decision whether to make further adjustments to its scope.

ARGUMENT

I. A Trustee Cannot Disregard a Transfer By or To a Financial Institution That Was an Integral Part of an Overall Transaction Merely Because the Trustee Insists That He Seeks Only To Unwind the Broader Transaction.

FTI argues that the transfers by and to financial institutions in this case do not matter, because a court

must evaluate "the transfer by the debtor that the trustee seeks to avoid, not the component transactions" (Resp. Br. 22). And in this case, FTI insists, the transfer it attacks was made solely by Valley View and solely to Merit. This approach represents an effort to gloss over the actual facts of the transaction and their legal import.

A. The purchase and sale of stock in this case was an integrated transaction involving multiple transfers.

FTI's characterization of the complex transaction at issue here as a single transfer of $16.5 million from Valley View to Merit – and only this single transfer – blinks reality.[1] True, in the end, Valley View paid Merit and others $55 million for the stock of Bedford Downs. But it accomplished that payment in several steps, each of which was itself a transfer of an interest in Valley View's property. For example, Merit explained in its opening brief that Credit Suisse's payment of the purchase price to Citizens was a transfer, as defined in Section 101 (Pet. Br. 19). FTI has not disputed this analysis.

An example from FTI's brief demonstrates the point. FTI argues that most homeowners would not say

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[1] FTI suggests that Merit agreed below with its characterization of the stock transaction as a single transfer (Resp. Br. 16, 44, 49). But the sentence from which FTI quotes was simply Merit's summary of the complaint, not an acknowledgment that it was legally or factually sound (7th Cir. Appellee Br. 5). In any event, Merit referred there to "transfers" – plural.

that their mortgage payments were paid by their bank (Resp. Br. 49).[2] Perhaps not, but a typical mortgage payment includes a component held in escrow by the lender for property taxes and insurance. *See* 12 U.S.C. § 2605(g). A homeowner might say any of the following about this arrangement:

- I paid this month's escrow payment.
- The lender paid the property taxes after the county sent a bill.
- I paid my property taxes before year-end.

All of these statements are accurate, but they describe interrelated transactions. To "avoid" means to "undo," as FTI suggests (Resp. Br. 1), or "[t]o render void." Black's Law Dictionary 163 (10th ed. 2014). The homeowner could not avoid his transfer to the taxing authority without also undoing its indispensable parts: the transfers by and to the lender.

The same is true here. There was no discrete or independent transfer from Valley View to Merit. The plain language of Section 546(e) asks whether a transfer was either "by," "to," or "for the benefit of" a financial institution or other specified entity. Nothing in the words of the statute suggests that a trustee can recharacterize the transaction to ignore its parts and the involvement of the entities that trigger the safe harbor.

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[2] FTI here parts ways with the Seventh Circuit, which agreed with FTI's argument that the word "by" was ambiguous and gave electronic bill payment as an example (Pet. App. 5).

Indeed, no court – including the Seventh Circuit below – has adopted FTI's argument. Although the courts of appeals have reached different conclusions, all have focused on whether what FTI terms "component" transfers were made "by" or "to" a financial institution or another entity specified in Section 546(e). None has suggested that a court can simply ignore the component transfers, as if they never occurred.

B. Respondent's arguments for disregarding the component transfers are unpersuasive.

FTI insists that a trustee "is not free to deconstruct the transaction and designate the *by* and *to* as convenient" (Resp. Br. 33-34). But it is FTI that does this, repackaging the transaction to fit its argument. FTI's justification for ignoring the component transfers appears to be derived from its view that it could not have avoided them anyway, and so Congress could not have intended them to have any significance (*id.* 24).

1. Part of FTI's argument is that it could not have avoided a transfer made *by* Credit Suisse, because Credit Suisse was not the debtor in the underlying bankruptcy case (*id.* 23-24). This theme underlies many of FTI's other arguments (*id.* 2, 6-7, 18, 33). Despite stray comments by courts and commentators to this effect, it is contrary to the language of the Bankruptcy Code.

The Bankruptcy Act of 1898 permitted a trustee to avoid a fraudulent transfer "by a debtor." 11 U.S.C. § 107(d)(2), (3) (1976) (repealed 1978). But the analogous section of the Bankruptcy Code retained that requirement only in two situations: a transfer motivated by actual intent to hinder, delay, or defraud creditors, and a transfer to an insider under an employment contract. *See* §§ 548(a)(1)(A), 548(a)(1)(B)(ii)(IV). In 2005, Congress added a third: a trustee may avoid a transfer to a self-settled trust if, among other things, "such transfer was by the debtor." § 548(e)(1)(B).

Outside of these specific circumstances, a trustee may avoid a fraudulent transfer made by a non-debtor so long as the transfer is "of an interest of the debtor in property." § 548(a)(1). Of particular relevance to this case, a trustee may avoid a transfer as a constructive fraudulent conveyance if the debtor did not receive fair value in exchange and the debtor was insolvent or otherwise in financial distress. *See* § 548(a)(1)(B)(ii)(I)-(III). The statute does *not* require that the transfer was made by the debtor. Thus, nothing (other than the safe harbor) would preclude FTI from attempting to avoid Credit Suisse's transfer of the purchase price – funds in which Valley View had an interest, since it had borrowed and agreed to repay them – to Citizens.[3]

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[3] The other relevant avoidance statutes are consistent. Sections 544 and 547 refer to a transfer of the debtor's property or interest in property, and Section 545 involves the fixing of a lien on the debtor's property. §§ 544(a), 544(b)(1), 545, 547(b). The identity of the party that causes the transfer to occur is not significant.

Avoidance actions arising from transfers by non-debtors are relatively common, and the idea that a trustee has standing to pursue them is not controversial. This Court, for example, considered a lender's foreclosure sale of a debtor's real estate in *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994). The Court rejected the claim because the debtor received reasonably equivalent value, not because the transfer was made by the lender. *See id.* at 545.[4]

2. FTI also argues that Citizens is not an "initial transferee" exposed to liability under Section 550, and so the transfer to Citizens may be disregarded (Resp. Br. 38). This argument inappropriately relies on the ability of a trustee to *recover* from a particular defendant under Section 550 to limit the scope of *avoidance* under Section 546(e). But, by precluding avoidance of a transfer altogether, Section 546(e) bars the trustee from recovering from *any* potential defendant. *See* § 550(a) (permitting trustee to pursue recovery only "to the extent that a transfer is avoided"). FTI

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[4] Other examples of potentially avoidable transfers made by non-debtors include *In re Smith*, 811 F.3d 228, 236 (7th Cir. 2016) (tax sale); *In re Marshall*, 550 F.3d 1251, 1256 (6th Cir. 2008) (balance transfer between credit-card issuers); *In re Criswell*, 102 F.3d 1411, 1415 (5th Cir. 1997) (creditor's recording of judgment abstract); *In re Freedom Group, Inc.*, 50 F.3d 408, 410 (7th Cir. 1995) (creditor's garnishment of bank account); *In re Besing*, 981 F.2d 1488, 1494 (5th Cir. 1993) (court's dismissal of causes of action); and *In re Hulm*, 738 F.2d 323, 325 (8th Cir. 1984) (sheriff's deed following judicial foreclosure).

pays lip service to the idea that "avoidance and recovery are distinct concepts" (Resp. Br. 38), but its circular reasoning hopelessly conflates the two.

The argument also overlooks the actual timing of the transaction. For three years – a period that included the commencement of Valley View's bankruptcy case – Citizens was in possession of millions of dollars. Because the conditions for the release of the funds had not been satisfied, the eventual recipient of the money remained uncertain. Had a trustee brought suit during that period, and assuming that the fraudulent-transfer claim otherwise had merit, recovery of those funds from Citizens would have been the only rational result. FTI's argument does not account for the fact that Citizens would have been a proper defendant in an avoidance and recovery action for a long period of time, except that the safe harbor plainly would have barred the claim.

In any event, FTI's argument again ignores the words of the statute. Section 550 permits a trustee to recover an avoided transfer from a "transferee," a term that many courts have construed to exclude an intermediary that did not obtain a beneficial interest in the transferred property. Section 546(e) does not use that term. It applies if the transfer was "by," "to," *or* "for the benefit of" a financial institution. If, as here, the transfer was "by" (and "to") a financial institution, there is no statutory requirement that it *also* have been "for the benefit of" a financial institution. The disjunctive use of these three terms, as well as the inclusion in Section 546(e) of entities that virtually never transfer

securities for their own benefit, is telling. Congress must have intended the safe harbor to apply where a transfer is made *by* or *to* a specified entity, even if that entity did not have a beneficial interest in the transferred property.

FTI attempts to sweep away the question on which the Court granted certiorari, declaring the difference between "to" and "for the benefit of" to be a straw man (Resp. Br. 51). But the significance of an institution's beneficial interest in a transaction is at the heart of the circuit split. *Compare In re Munford, Inc.*, 98 F.3d 604, 610 (11th Cir. 1996) (disregarding financial institution because it "never acquired a beneficial interest in the funds"), *with Contemporary Industries Corp. v. Frost*, 564 F.3d 981, 987 (8th Cir. 2009) (statute "does not expressly require that the financial institution obtain a beneficial interest in the funds"). In any event, there is no practical distinction between "no beneficial interest" and the concept that FTI finds determinative – "financial intermediary or conduit." Whether FTI uses the term "beneficial interest" or not, the only reason it can argue that the financial institutions in this case should be ignored is its view that they had no beneficial interest in Valley View's payment.

II. Respondent's Conception of the Purpose of Section 546(e) Is Inconsistent with the Statute's Actual Terms and Purposes.

FTI tethers its interpretation of Section 546(e) to what it claims was Congress's only purpose when it

originally enacted the provision back in 1982: preventing the insolvency of one commodities or securities firm from spreading to others (Resp. Br. 41). According to FTI, the safe harbor protects transfers only "to the precise degree necessary to shield protected entities and avoid ripple effects to the securities industry" (*id.* 56). The actual words of the statute, in its original form and especially as amended, suggest far-broader congressional concerns. Because Section 546(e) in fact extends much further than FTI suggests, the legislative history of the original provision cannot constrain the meaning of the present-day statute.

A. Respondent's argument does not explain why Congress protected transfers "by" financial institutions, stockbrokers, and other specified entities that become debtors, and not merely transfers "to" them.

FTI's narrow construction of Congress's legislative objectives cannot be reconciled with a basic feature of Section 546(e): it protects a transfer if it is "by," and not merely if it is "to," a financial institution or other specified entity. Avoidance and recovery of a transfer made *by* an insolvent securities or commodities firm does not inherently spread market instability. Yet, by its plain terms, Section 546(e) would bar such a suit, even if the defendant was an individual investor, a 401(k) plan, a commercial business, or some other entity not named in Section 546(e). And this is true even if avoidance and recovery of the assets might permit the debtor firm to

return to solvency, continue in business, and honor its obligations. Barring avoidance actions in those circumstances cannot be explained by FTI's characterization of Congress's supposed sole purpose.

FTI acknowledges that the safe harbor would apply to a securities-related transfer by a financial-institution debtor to Merit (Resp. Br. 46). Recognizing the tension between its construct of Congress's purpose and the actual words of the statute, FTI suggests that Congress protected transfers *by* financial institutions and other specified entities because reopening "thousands of transactions by a key hub in the securities industry" would be undesirable (Resp. Br. 31. n.7). But only recovery of transfers made *to* recipients that also are industry hubs (*i.e.*, other specified entities) could expose such entities to potentially ruinous liability, and those transfers are protected independently by the "to" provision of the statute. Thus, Congress's inclusion of "by" in the statute necessarily means that its purpose was broader than FTI posits.

Moreover, reopening thousands of transfers that could be characterized as made *through* key hubs in the securities industry, which is precisely what FTI argues the statute permits (Resp. Br. 56-57), surely could be disruptive for the securities markets (Tribune/Lyondell Shareholders' Br. 5-6, 15-16). There is no reason to believe that Congress was troubled by the possibility that transfers *by* an industry hub could be

unwound but yet was unconcerned about trustees' pursuit of transfers made *through* industry hubs.[5]

B. Respondent's argument does not account for the safe harbor's protection of transfers of debtors' property "by" nondebtor financial institutions, stockbrokers, and others.

As explained above in Point I.B, Section 546(e) applies to a transfer "by" a financial institution or other specified entity even if that entity does not become the debtor in bankruptcy. This, too, cannot be reconciled with FTI's begrudging conception of the statutory purpose.

Banks and brokers have the power to transfer a customer's securities or commodities to a third-party purchaser in connection with a margin call or a pledge of stock. *See generally A.D.M. Corp. v. Thomson*, 707 F.2d 25, 26-27 (1st Cir. 1983) (discussing application of securities laws to lender's sale of unregistered securities pledged as collateral); 12 C.F.R. § 220.4(d) (requiring broker to liquidate customer's securities if customer does not meet margin call). The safe harbor

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[5] FTI insists that avoidance of a payment between two non-hubs is not a matter of concern, whether the payment is $1,000 or $100 million (Resp. Br. 43 & n.9). But Congress chose to preclude avoidance of a payment, regardless of amount, *by* an industry hub to a non-hub, as well as avoidance of a payment of an immaterial amount such as $1,000 *to* an industry hub. Neither of these concerns can be explained solely by a legislative desire to prevent insolvencies of, or ripple effects among, industry hubs.

plainly precludes the customer's trustee from avoiding such a transfer, because it was made *by* a specified entity in connection with a securities or commodities contract, even though avoidance of the transaction would pose no threat to any other securities or commodities firm.[6]

C. Respondent's argument does not make sense of Congress's decision to protect subsequent transferees and other Section 550 defendants.

A trustee may pursue recovery of transferred property or its value from several parties, including the initial transferee, the entity for whose benefit the transfer was made, and subsequent transferees. *See* § 550(a). Where Section 546(e) bars avoidance of a transfer altogether, however, the trustee cannot recover from any of these parties, even those that are not principal players in the financial markets. Thus, the safe harbor's protection of a debtor's bargain sale

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[6] Congress's inclusion of a bank's securities customers within the definition of "financial institution" is especially inconsistent with FTI's construction of the safe harbor. *See* § 101(22)(A). A transaction involving such a bank customer is, in FTI's view, a transfer *by* the customer *to* the counterparty, with the bank-agent acting solely as a financial intermediary. Because the customer counts as a "financial institution," a trustee could not avoid that transfer, even though the transfer did not involve any property of the bank, and regardless of the identity of the counterparty (*i.e.*, even if there could be no possible impact on a securities firm). The only conclusion is that Congress intended to protect the finality of the transaction, not just the stability of securities firms.

of securities to a broker also shields an individual who benefits from the transfer (perhaps a wealthy executive who guaranteed an underlying obligation) and a subsequent transferee of the securities (such as another customer of the broker that pays triple the initial price).

FTI's formulation of the purpose of the safe harbor does not explain why these secondary defendants, who could reimburse a trustee without causing any securities or commodities firm to fail, are shielded from liability.

D. The statute's protection of these transfers indicates that Congress had broader goals, including protecting parties' interests in the finality of transactions in securities and commodities.

The foregoing discussion demonstrates that when Congress enacted and amended Section 546(e), it must have had more in mind than merely protecting the six categories of entities specified in the statute from "having to return money" because the effect on their liquidity could "ripple across the financial markets" (Resp. Br. 56). If that were the legislature's only goal, a much simpler and more straightforward solution has always been available: allow transfers to be avoided, but provide in Section 550 that a trustee cannot recover from the six categories of entities. Indeed, Congress adopted this approach in 1994 when it disagreed with the Seventh Circuit's analysis of the preference statute in

Levit v. Ingersoll Rand Financial Corp., 874 F.2d 1186 (7th Cir. 1989). It enacted Section 550(c), limiting the trustee's recovery to the debtor's insiders. *See* H.R. Rep. 103-835, at 44-45 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3353 (explaining that § 550(c) was intended to overrule *Levit*).

Congress did not pursue that simple solution for securities and commodities transfers. Instead, it placed the safe harbor in Section 546, where it expressly overrides several avoidance powers and thereby precludes a trustee from recovering from anyone. Section 546(e) thus protects transfers, not particular transferees. *See Levit*, 874 F.2d at 1195 ("[A]voidability is an attribute of the transfer rather than of the creditor.").

Congress's choice must be respected. Although Congress did not explain precisely why it expanded Section 546(e) over the decades, the context in which the safe harbor operates suggests a sound rationale. The traditional domain of fraudulent-transfer law – sham transfers, gifts by insolvent debtors to relatives, and similar judgment-proofing actions – involves behavior that is obviously contrary to the interests of creditors. *See* Douglas G. Baird & Thomas H. Jackson, *Fraudulent Conveyance Law and Its Proper Domain*, 38 Vand. L. Rev. 829, 832 (1985). Transactions in securities and commodities, by contrast, present the possibility of benefits to creditors, such as a lender's receipt of interest or a vendor's profit on goods sold to the debtor. These transactions also typically occur on

terms set by the market or in arm's-length negotiations among sophisticated parties. And they are at the core of our nation's economy, in which businesses raise capital by issuing, selling, and trading securities.

A suit to avoid a constructive fraudulent transfer effectively seeks to reprice or otherwise renegotiate a transaction after the fact, and it thus disrupts the expectations of those who purchased or sold in the original transaction. *See id.* at 834 ("Allowing creditors to escape the consequences of their debtor's bad decisions after the fact has costs as well as benefits."). The possibility of such a suit, potentially years after the transfer at issue, can have a chilling effect on transactions. Congress may well have concluded that, absent actual fraudulent intent, this disruption to the nation's financial markets is not warranted. *See In re Tribune Co. Fraudulent Conveyance Litigation*, 818 F.3d 98, 121 (2d Cir. 2016) (safe harbor reflects "a purpose of enhancing the efficiency of securities markets in order to reduce the cost of capital to the American economy"), *petition for cert. filed* (Sept. 9, 2016) (No. 16-317).[7]

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[7] FTI frequently invokes the interests of "innocent creditors," but a trustee's desire to increase the bankruptcy estate for the benefit of creditors cannot overcome a congressional determination that a particular asset should be out of reach. *See Patterson v. Shumate*, 504 U.S. 753, 763-64 (1992). In any event, the implication that recipients of fraudulent transfers are not so innocent is baseless. A claim of constructive fraud requires no malfeasance by the defendant, who may have done nothing more than receive funds in a transaction that she did not negotiate or have any power to modify (Tribune/Lyondell Shareholders' Br. 5-7).

III. Respondent Misreads the Statutory Context and History.

A. Petitioner's interpretation of Section 546(e) is consistent with the statutory context.

The context of Section 546(e) is consistent with its broad scope.

The protection of charitable contributions in Section 548(a)(2) does not undermine Merit's interpretation of Section 546(e). FTI's argument rests solely on the debtor's use of a check or wire transfer to make the contribution (Resp. Br. 34). Aside from the fact that the IRS surely would consider such a transaction to be a valid contribution by the donor to the charity, the comparison to this case is not apt. Suppose instead that the debtor-taxpayer contributed $5,000 to a family charitable trust by sending the funds to a trust company, and then a month later, the debtor directed the trust company to contribute the same amount to a charitable organization. There would be reasonable grounds for disagreement about whether the debtor made a transfer to the charity and, if so, whether it met the requirements of Section 548(a)(2). But no one would suggest that the debtor's charitable contribution was independent of the transfers to and by a financial institution by which the contribution was accomplished.

Section 555 also is no obstacle to a broad interpretation of the safe harbor. It addresses a distinct issue: whether a stockbroker, financial institution, financial participant, or clearing agency may enforce

its contractual rights under a securities contract despite the automatic stay. *See* § 555. But it does not require that the firm be a party to that contract for its own account. The definitions of stockbroker and financial institution specifically contemplate that those firms may act on behalf of their customers. *See* §§ 101(22)(A), 101(53A)(B). And a securities clearing agency does little else. Section 555 thus protects the interests of both the contracting parties and any of their customers that may have interests in the underlying transaction.

B. Respondent's analysis of *Seligson* and former Section 764(c) is erroneous.

FTI describes the safe harbor as providing "belt-and-suspenders protection" to intermediaries that should be protected from liability under Section 550 anyway (Resp. Br. 39). In certain scenarios, this is a fair characterization of today's version of Section 546(e). But it does not fit well with the statute's history.

All agree that Congress intended to overrule *Seligson v. New York Produce Exchange*, 394 F. Supp. 125 (S.D.N.Y. 1975), when it enacted the original safe harbor, Section 764(c), in 1978. But whether Congress in fact accomplished that goal depends on how its language is interpreted. *Seligson* involved margin payments that had been made by a commodities broker (Haupt) to a clearing association. *See id.* at 126-27. In response to the decision, Congress enacted a safe harbor that did *not* protect payments by brokers to

clearing agencies explicitly. Instead, Congress precluded a trustee from avoiding "a margin payment *to* or deposit *with* a commodity broker" and "a settlement payment made *by* a clearing organization." § 764(c) (repealed 1982) (emphasis added). The only way Congress's fix could have had the desired effect of producing a different result in *Seligson* was if Haupt's margin payments *to* the clearing association (the precise transfers that the trustee sought to avoid) were regarded as a component part of a larger transaction, inseparable from the margin payments that Haupt received from its customer or from the settlement payments made by the clearing association to members of the exchange, both of which Congress did address in the statute.

If FTI's construction were valid, by contrast, Haupt's trustee could have dodged the safe harbor merely by declaring that the transfers he sought to avoid were the transfers of margin payments by Haupt to the clearing association. Congress, however, must have intended that a court construe the transaction as an integrated whole. No other interpretation explains its drafting choices as it sought to overrule *Seligson*.

C. Respondent's use of legislative history is unpersuasive.

FTI relies on snippets of legislative history to suggest that Congress's repeated expansions of the scope of Section 546(e) did not alter its narrow original function of preventing ripple effects in the securities and

commodities markets. Even if that had been Congress's sole purpose in 1982, by the time Congress added financial institutions and financial participants in 1984 and 2005, the statute plainly protected against more than just existential threats to securities and commodities firms. That is the case particularly because transfers *by* firms mentioned in the statute *to* entities not mentioned had already been put beyond a trustee's avoidance powers, and because the entities specified in that provision included securities clearing agencies and others that almost always act as intermediaries between other parties (Pet. Br. 25-26). The 2006 addition of securities contracts, commodities contracts, and forward contracts represented a further expansion of coverage. And Congress also included the alternative "(or for the benefit of)" in 2006.

FTI twice asserts that Congress reaffirmed in 2005 that Section 546(e) is about "systemic risk" (Resp. Br. 41, 55). In fact, that statement from the legislative history was not specific to any section of the Code or the 2005 legislation. It was part of an introductory paragraph describing the changes made to the business bankruptcy provisions of the Code by a lengthy bill. H.R. Rep. No. 109-31(I), at 3 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89.

FTI also suggests that all of the 2006 amendments should be construed as "technical changes" because that phrase appears in the introduction to a House Report (Resp. Br. 52, 53, 55). But the addition of securities contracts, commodities contracts, and forward contracts – each defined expansively, *see*

§§ 101(25), 741(7), 761(4) – to the safe harbor was in no sense merely a technical change. It introduced protection for off-exchange transactions and otherwise placed an entirely new set of transfers beyond the reach of a trustee, even though avoidance of many of those transfers would pose no threat to the soundness of the principal players in the financial markets.

Professor Brubaker and FTI have offered an explanation of the addition of "(for the benefit of)" that would qualify as a technical correction (Resp. Br. 52-53). But even if Congress's particular goal were to tie the safe harbor more closely to for-the-benefit concepts found elsewhere in the Code, the amendment nevertheless undermined the reasoning of *Munford*, which disregarded a payment to a bank because the bank "never acquired a beneficial interest in the funds." *Munford*, 98 F.3d at 610.

All of the foregoing rebuts FTI's claim (Resp. Br. 52, 55) that one should expect "some affirmative indication of intent" if Congress meant to change the law. *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 984 (2017). *Jevic* involved "simple statutory silence" in the face of a longstanding priority system. *Id.* There is no statutory silence or elephant in a mousehole here. Congress has been openly and obviously expanding the safe harbor over the last 35 years. *See, e.g., Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 559 U.S. 280, 298 (2010) (enforcing amendment limiting a subset of litigation that Congress apparently deemed "unmeritorious or downright harmful," even though legislative history did not

explain precise scope of amendment). What Congress has not done during that period is to overrule decisions interpreting the safe harbor broadly, including those controlling in popular venues for corporate bankruptcies. *See, e.g., In re Resorts International, Inc.*, 181 F.3d 505, 516 (3d Cir. 1999).

IV. A Broad Interpretation of Section 546(e) Does Not Portend the Demise of Fraudulent-Transfer Law.

Amici boldly assert that "Petitioner's theory deletes 400 years of fraudulent transfer law from the books (unless the transfer at issue was made with bags of cash)" (Tribune Retiree Br. 16). FTI's rhetoric is not so extreme, but it decries "results that only the recipient of an avoidable transfer could love" (Resp. Br. 58). These statements are grossly exaggerated.

1. Bankruptcy trustees' bread and butter – transfers of real estate, personal property, and money, unrelated to the securities and commodities markets – will be unaffected by a broad reading of Section 546(e). Trustees also will be able to continue to attack complex corporate transactions, including those involving securities and commodities, on many grounds. For example, nothing in Section 546(e) bars a trustee from avoiding a debtor's obligations. *See Rubin v. Manufacturers Hanover Trust Co.*, 661 F.2d 979, 993 (2d Cir. 1981) (discussing avoidance of debtors' guarantees of affiliates' debts); *In re TOUSA, Inc.*, 680 F.3d 1298, 1310-11 (11th Cir. 2012) (affirming judgment avoiding liens

granted by debtors). A debtor's distribution of a dividend on existing stock also may not be protected by the safe harbor. *See In re Global Crossing, Ltd.*, 385 B.R. 52, 56 n.1 (Bankr. S.D.N.Y. 2008). And the many other tools trustees have at their disposal are unimpaired, including claims to avoid actual-intent fraudulent transfers, claims against officers and directors for approving an unwise transaction, and claims for common-law fraud or breach of contract.

Thus, even if it were accurate to describe the safe harbor as an exception to the general rule permitting trustees to avoid certain transfers, the exception by no means swallows the rule (Resp. Br. 27-28). As the Court concluded in *BFP*, the constructive-fraud provisions of the Code are not rendered superfluous merely because they do not apply to a particular type of transaction. *See BFP*, 511 U.S. at 545.

2. This is not a case in which a transaction was merely "executed by wire transfer" or "routed through a bank" (Resp. Br. 25, 54). Two financial institutions were centrally involved in financing and administering the securities transaction here, and similar facts were present in all of the other cases giving rise to the circuit split. It is thus mere hyperbole for FTI to say that if Merit is protected by the safe harbor, so is "everyone else on the planet" (*id.* 54).

The question whether the safe harbor applies if a bank merely processes a check or wire transfer has arisen only in a handful of cases – none cited by FTI or its *amici* and none decided by courts of appeals – with

varying results. *Compare In re Loranger Manufacturing Corp.*, 324 B.R. 575, 585-86 (Bankr. W.D. Pa. 2005), *with In re TVGA Engineering, Surveying, P.C.*, 562 B.R. 862, 865 (Bankr. W.D.N.Y. 2016). But the Court need not determine whether passive payment processing is sufficient, because the banks involved in this case had active and substantial roles: financing the transaction, administering the closing, and ensuring that a portion of the purchase price was available to the buyer if it made an indemnity claim (which it did not) or to the seller if the buyer filed a bankruptcy petition (which it did).

Nor is there an epidemic of transactions in which financial institutions have been inserted solely to permit the parties to invoke the safe harbor (Resp. Br. 57). Should such a situation arise, the lower courts have adequate tools to address it, such as disregarding the maneuver as a sham or considering it as evidence of actual fraudulent intent. *See In re Quebecor World (USA), Inc.*, 719 F.3d 94, 100 n.4 (2d Cir. 2013).

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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